

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY JAMES FLANNIGAN, JR.,

Defendant-Appellant.

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UNPUBLISHED

May 5, 2005

No. 252192

Livingston Circuit Court

LC No. 02-13058-FC

Before: Fort Hood, P.J., and Meter and Schuette, JJ

PER CURIAM.

A jury convicted defendant of bank robbery, MCL 750.531, and felony-firearm, MCL 750.227b. The court imposed consecutive prison sentences of 19 to 30 years and two years, respectively. Defendant appeals as of right. We affirm.

**I. FACTS**

On December 28, 2001, defendant walked in to a bank wearing layered clothing. He was wearing a down jacket, a cap pulled on his head, and perhaps a hooded jacket underneath the other jacket. Brenda Coleman, the bank teller on the day of the robbery testified that she got a good look at his face after she greeted him and they made eye contact. Defendant approached her station, looking around to see who else was in the bank. He had a gun in his right hand and handed her a note with his left hand. The note demanded ten thousand dollars in large bills. He got upset and said “I told you large bills” when she “was giving out twenty’s and ten’s [sic],” He took the money and his note and left. She notified her coworker and manager of the robbery.

A customer at the bank saw defendant flee the scene in a silver or gray Tahoe or Yukon. Officer Scott Good testified that on the day of the robbery he heard over the radio that the possible suspect was driving a silver or gray Tahoe or Yukon with a bumper guard on the front. A vehicle matching that description drove by at a fairly high rate of speed with defendant driving. He followed in his unmarked police car. Marked police cars joined and initiated a traffic stop by turning on their lights when they were stopped at a traffic light behind the driver. Defendant pulled his car over the curb to a parking lot and fled. Police pursued and caught defendant. Inside the car they found a robbery note that was printed off of a computer.

**II. PRODUCTION OF WITNESS AND ADJOURNMENT**

Defendant argues that the trial court abused its discretion when it allowed the prosecution to strike a witness from its list and denied defendant's request for an adjournment to secure production of that witness. The witness was an FBI agent involved in the investigation of defendant who was transferred to terrorism detail.

#### A. Standard of Review

Defendant preserved the issue of whether the agent's testimony was relevant, but defendant did not argue below that the prosecution did not present sufficient facts to show that it attempted due diligence to produce the witness. That claim shall therefore be reviewed for plain error affecting substantial rights under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court reviews a trial court's decision to allow the prosecutor to strike a witness from its list for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995). Similarly, this Court reviews a trial court's decision to grant or deny an adjournment for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 655 (2002).

#### B. Analysis

The trial court did not abuse its discretion when it allowed the prosecution to strike the FBI agent from the witness list. He was present at an interrogation of defendant. The other law enforcement officer at the interrogation testified at trial. Defendant therefore had opportunity to explore, as he argues, claims of false allegations and the implication of someone else in the robbery.

The agent also investigated other robberies and, according to defendant, cleared him of responsibility for those robberies. Even if true, these facts would not tend to make defendant's guilt of the particular robbery for which he was on trial any more or less likely. The testimony would therefore not have been relevant under MRE 401. The court did not abuse its discretion when it refused to compel a witness who could only offer irrelevant testimony on collateral issues.

The testimony of the witness would have been duplicative or irrelevant and this Court need not reach whether the prosecution offered sufficient facts showing its due diligence in procuring the witness's testimony. This is so because the nature of his testimony means that whether the agent testified made no difference in the trial.

### III. JURY SELECTION

Defendant next argues that the jury selection process was improper and that reversal is required under MCR 2.511(F). We disagree.

Defense counsel agreed to this type of selection process. MCR 2.511(A)(4) provides that counsel may agree to juror selection by "any other fair and impartial method" which differs from the random selection process set out in §§ (A)(2) and (3) of the rule. Defense counsel actively approved of the selection process; thus, the issue is waived for appeal. Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 214; 612

NW2d 144 (2000). Waiver is available in a broad array of constitutional and statutory provisions. *Id.* at 217-218. Although there are some basic rights that an attorney may not waive without the fully informed and publicly acknowledged consent of his client, a lawyer has full authority to manage the conduct of trial and make decisions pertaining to the conduct of trial. *Id.* Jury selection is generally a matter of trial conduct or strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Thus, the manner of jury selection is capable of being waived by defense counsel and, in this case, was waived. Waiver extinguishes any error. *Carter, supra* at 215. Accordingly, there is no error to review. *Id.* at 219.

To the extent that the issue was not waived, it is unpreserved. *People v Colon*, 233 Mich App 295, 300; 591 NW2d 692 (1998) (to preserve a jury selection error for appeal, a defendant must object to the jury selection procedure before the process begins). Unpreserved allegations of error, constitutional and nonconstitutional, are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). While the method of jury selection may have been improper, *Colon, supra* at 303, automatic reversal is not required. *People v Green (On Remand)*, 241 Mich App 40, 45; 613 NW2d 744 (2000). Defendant has not demonstrated that the method utilized was unfair or partial. *Id.* Thus, defendant's substantial rights were not affected. Defendant has not demonstrated that any error in the jury selection affected the outcome of his trial. *Carines, supra*. Even if prejudice existed or is presumed, reversal is not required. Any error did not result in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity or public reputation" of defendant's trial. *Id.*

#### IV. SUFFICIENCY OF THE EVIDENCE

Defendant also claims that there was insufficient evidence supporting his conviction for felony-firearm. We disagree.

##### A. Standard of Review

This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The standard for reviewing a claim of insufficient evidence is deferential and this Court must make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id.*; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

##### B. Analysis

The testimony of the teller supported a rational finding by the jury that defendant used a real gun. She testified that defendant held the gun in his right hand directly in front of her at close range at the counter. She described the gun with some detail, noting its dull black color on the handle and barrel, the fact that it was scuffed, and that it appeared heavy and real. She also identified it as a revolver after she viewed pictures of different types of firearms. While on cross-examination she conceded that she did not know for certain it was a real gun, she did believe it was and the jury was free to weigh her doubt and decide if it led to reasonable doubt in its collective mind. This Court should not interfere with the jury's role of determining the weight of evidence. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Questions of credibility should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

## V. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he received ineffective assistance of counsel. Defendant alleges that his counsel was ineffective for failing to object to the following three types of evidence presented at trial: 1) defendant's criminal history, 2) his past bad acts, and 3) his initial post-arrest silence. Again, we disagree with defendant's arguments.

### A. Standard of Review

Defendant must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for prejudice, defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . ." *Id.* at 167. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694.

### B. Analysis

Defendant's claim of ineffective assistance of counsel must fail because he cannot demonstrate prejudice. Even if defendant's counsel objected to the evidence defendant now claims is improper, the outcome of trial would not have changed. The overwhelming weight of the evidence against defendant demonstrates that the jury had an independent basis for its verdict and did not find him guilty based upon a notion of his propensity to commit crime because of his criminal history and past bad acts or because of a guilty mind due to his initial post-arrest silence.

The jury heard identification testimony from the teller, who observed defendant at close range and identified him in court as the armed robber. It viewed the security camera footage of the robbery, including stills from that video and another video depicting his car near the scene of the crime. A customer present at the bank also identified defendant in court as the robber. A different customer at a nearby body shop also identified defendant and his vehicle as present in the parking lot. Finally, police recovered the robber's coat in defendant's residence. In light of this evidence taken together, the jury rationally concluded independent of the allegedly improper evidence that defendant was guilty of the bank robbery for which he was charged.

Affirmed.

/s/ Karen Fort Hood  
/s/ Patrick M. Meter  
/s/ Bill Schuette